MOTION FILED
JUN 1 1981

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1980

NO. 80-6655

MARGARET B. WATERS,

Petitioner

versus

CONLEY HENDERSON, et al.,

Respondents

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE BLOCH AND LEVINSON

L. Harold Levinson
(counsel of record)
Susan L. Kay
Vanderbilt Law School
Nashville, Tennessee
Telephone: 615-322-6630
Attorneys for
Amici Curiae

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AS AMICI CURIAE

L. Harold Levinson and Frank S. Bloch, faculty members of Vanderbilt University School of Law, move this Court, pursuant to Rule 36 of the Rules of Supreme Court, for permission to file a brief and to appear in this case as amici curiae.

Applicant Frank S. Bloch is an Associate Professor of Law and Director of Clinical Legal Education at Vanderbilt. Applicant L. Harold Levinson is a Professor of Law who teaches the course on Professional Responsibility at Vanderbilt. Amici do not represent either party in the litigation, nor do they represent Vanderbilt School of Law. Their interest in this case is that it raises an issue which is important to the administration of justice and to the practice of law: Whether a litigant is denied due process when opposing counsel is a judge who presides over other cases in the court in which the case is tried.

Petitioner Waters has filed a document entitled a "Jurisdictional Statement" in this Court. Prospective amici would ask that the Court consider it as a Petition for Writ of Certiorari to the Tennessee Supreme Court.[1] This document, filed pro se, raises the issue which prospective amici expand on and analyze in their brief.

Because Petitioner Waters has filed her petition pro se, prospective amici would offer any further services this Court may request.

Petitioner Waters has no objection to the filing of a brief by amici in this case.

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1. Consequently, prospective amici will refer to Ms. Waters as "Petitioner" and to her document as a "Petition for Certiorari."

Respectfully submitted,

SUSAN L. KAY*

L. HAROLD LEVINSON**
Attorneys for Amici Curiae
Vanderbilt Law School
Nashville, Tennessee 37240
(615) 322-2615

*Admitted to practice in Tennessee; not admitted to practice in the United States Supreme Court.

**Admitted to practice in the United States Supreme Court, Florida and New York; not admitted to practice in Tennessee.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed, U.S. postage prepaid, to Charles Johnson, 148 Court Avenue, Sevierville, Tennessee 37866, attorney for Respondents, Margaret B. Waters, P.O. Box 2713, Nogales, Arizona 85621, and Honorable William Leech, Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, on this the 30 day of May, 1981.

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BRIEF OF AMICI CURIAE

INDEX

	page(s)
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2-4
REASON FOR GRANTING THE WRIT . . .	5-14
Whether a litigant is denied due process when opposing counsel is a judge who presides over other cases in the court in which the case is tried.	
CONCLUSION	15

TABLE OF CASES, STATUTES AND AUTHORITIES CITED

CASES	PAGE(S)
Bassi v. Langloss, 22 Ill.2d 190, 174 N.E.wd 682 (1961)	7
Cady v. Lang, 95 Vt. 287, 115 A. 140 (1921)	10
Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838 (1949)	7
Eden v. Beaman, 167 Okla. 525, 30 P.2d 899 (1934)	7
Endresse v. Van Vleet, 118 Mont. 533, 169 P.2d 719 (1946)	6
Gibson v. Berryhill, 411 U.S. 564 (1973)	13
In re Investigation of Circuit Judge of the 11th Judicial Circuit 93 So.2d 601 (Fla. 1957)	7
In re Kenton County Bar Ass'n, 214 Ky. 664, 236 S.W.2d 906 (1951)	7
In re Murchison, 349 U.S. 133 (1955)	13
Perry v. Bush, 46 Fla. 242, 35 So. 225 (1903)	7

CASES — PAGE(S)

Prichard v. United States, 181 F.2d 326 (6th Cir. 1950), aff'd, 339 U.S. 974 (1950) . . . 10

Rogers v. Texas Optometry Bd., 609 S.W.2d 248 (Tex. Civ. App. 1980) 11

In Matter of Ryman, 394 Mich. 637, 232 N.W.2d 178 (1975). 8, 9

Schnackenberg v. Towle, 4 Ill.2d 561, 123 N.E.2d 817, cert. denied, 349 U.S. 939 (1955). . . 7

State ex rel. Nebraska State Bar Ass'n. v. Wiebusch, 153 Neb. 583, 45 N.W.2d 583 (1951) . . . 11

Tumey v. Ohio, 273 U.S. 510 (1927) 13

Wood v. Keith, 60 Ark. 425, 30 S.W. 756 (1895) 10

Young v. Grauman, 278 Ky. 197, 128 S.W.2d 549 (1939). 11

CONSTITUTIONAL PROVISIONS

Cal. Const. Art. 6, §18 6

Wash. Const. Art. 4, §19 6

STATUTES PAGE(S)

Ala. Code §34-3-11 6

Tennessee Code Annotated (hereinafter T.C.A.) §16-11-102 2

T.C.A. §16-11-103 2

T.C.A. §17-105 9

28 U.S.C. §454 (1976). 5

OTHER AUTHORITIES

Code of Judicial Conduct, Canon 5, F. (Am. Bar Ass'n. 1974) . . 8

E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 104 (American Bar Association, 1973) 8-9

QUESTION PRESENTED

Whether a litigant is denied due process when opposing counsel is a judge who presides over other cases in the court in which the case is tried.

STATEMENT OF CASE [1]

Early in 1971, Petitioner Margaret B. Waters filed a complaint in Sevier County Chancery Court[2] seeking to quiet title to a farm located in that county. After taking the oath of office as Chancellor[3] of the Chancery district which includes Sevier County on February 15, 1971, Earl Hendry filed an answer to petitioner's complaint on March 15, 1971, as counsel for the defendants and continued to represent them during the litigation, including personal presentation of argument in trial and appellate courts. Defendants prevailed at trial and on appeal.

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1. Amici wish to highlight the facts and events pertinent to the issue which they raise in their brief. Many of the dates and events have been taken from Petitioner Waters' petition.

2. Tennessee Chancery Courts are trial Courts of general civil and equitable jurisdiction T.C.A. §§16-11-102; 16-11-103.

3. Chancellors are the judges of Tennessee's Chancery Courts. There is only one Chancellor for the Chancery District which includes Sevier County.

On August 18, 1978, the defendants in the former action sought a temporary restraining order to restrain Petitioner Waters, inter alia, from making any assertions claiming any interest in the Sevier County property, from publishing any documents with relation to the property and from occupying or attempting to occupy the property. They were represented in this case by Attorney Charlie Johnson. Petitioner filed her answer on August 29, 1979. One of her defenses was that the original judgment was void due to the violation of due process inherent in Earl Hendry's representation of the opposing party after Hendry had become Chancellor. On September 26, 1979, the Court made the temporary restraining order a permanent injunction. On February 8, 1980, Petitioner Waters filed a Motion for Relief from the judgment; it was subsequently denied by the trial court. Petitioner appealed and on October 3, 1980, the Tennessee Court of

Appeals affirmed the decision. The petition for rehearing filed on October 10, 1980 was denied on October 21, 1980.

Petitioner filed for permission to appeal to the Tennessee Supreme Court on November 19, 1980. Prospective amici in this case filed for permission to appear as amici in the Tennessee Supreme Court on December 23, 1980. The petition to appear as amici was denied on January 30, 1981; permission to appeal was denied on March 16, 1981. Petitioner Waters filed her "Jurisdictional Statement" in this Court on April 30, 1981.

REASON FOR GRANTING THE WRIT

I.

Whether a litigant is denied due process when opposing counsel is a judge who presides over other cases in the court in which the case is tried.

This Court has not decided whether and to what extent judges may practice law without depriving the opposing litigant of Due Process of law. The general topic of the practice of law by judges has been addressed in several different ways by the various states and federal government.

The strongest prohibition against judges practicing law is found in Title 28 of the United States Code, §454 which provides:

> "Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor."

The Montana Supreme Court has interpreted this provision as operating to terminate

any pre-existing attorney-client relationship when the attorney becomes a federal judge. Endre se v. Van Vleet, 118 Mont. 533, 169 P.2d 719 (1946).

The constitutions and statutes of many states include an absolute prohibition against judges practicing law.[4] And although Illinois has no statutory or Constitutional prohibition against such practice, the Illinois Supreme Court has held that the practice of law by a judge "in or out of Court, directly or indirectly, is incompatible with his

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4. The California and Washington constitutions provide typical examples of absolute prohibitions. California Constitution Article 6, Section 18 states: "No justice or judge of a court of record shall practice law." The Washington Constitution, Article 4, Section 19 states: "No judge of a court of record shall practice law in any court of this state during his continuance in office." An example of a statute prohibiting practice by a judge is found in Alabama which penalizes judges who practice law. The penalty of a fine between $100 and $1,000 may be imposed for violation of the prohibition. Code of Alabama, Section 34-3-11.

judicial responsibilities and duties and contrary to public policy." Bassi v. Langloss, 22 Ill.2d 190, 174 N.E.2d 682, 684 (1961).[5]

One exception to the prohibition against the practice of law by judges is sometimes found, allowing newly appointed judges to wind down matters which they began prior to taking judicial office. This exception is judicially created in some jurisdictions and statutorily created in others. Michigan presents one example of the former category. Although a Michigan statute specifically precludes judges from practicing at all, it has been interpreted by the Michigan Supreme Court so as to allow winding down of a practice. Nonethe-

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5. This opinion is typical of those found in several other jurisdictions. In re Investigation of Circuit Judge of 11th Judicial Circuit, 93 So.2d 601 (Fla. 1957); Perry v. Bush, 46 Fla. 242, 35 So.225 (1903); Schnackenberg v. Towle, 4 Ill.2d 561, 123 N.E.2d 817 (1955), Cert. den. 349 U.S. 939 (1955); In re Kenton County Bar Ass'n., 314 Ky. 664, 236 S.W.2d 906 (1951); Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838 (1949); Eden v. Beaman, 167 Okla. 525, 30 P.2d 899 (1934).

less, the Court was specific in stating that such winding down could not include litigation. In Matter of Ryman, 394 Mich. 637, 232 N.W.2d 178 (1975). A similar interpretation could be read into American Bar Association's Code of Judicial Conduct. Canon 5, F of the Code prohibits full time judges from practicing law. However, a schedule to the Code of Judicial Conduct, entitled "Effective Date of Compliance," requires every person to whom the Code becomes applicable to "arrange his affairs as soon as reasonably possible to comply with it." The Reporter's Notes add: "For some activities, such as services on the Board of an organization likely to be litigating before a judge, a reasonable time may be only the short time needed to write a letter of resignation; a reasonable time for disposing of securities or other financial interest could be a much longer period." E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct

104 (American Bar Association, 1973.) Depending on how broadly the Reporter's comments are construed, winding down of a practice could be allowed for at least a short period of time, but there is no indication that the Code would permit a judge to function as litigating counsel during the winding down of a law practice.

By statute, Tennessee allows winding down by a newly appointed or elected judge. T.C.A. §17-105. In the case now before this Court, the Tennessee Court of Appeals interpreted the statute as allowing a newly appointed or elected judge to function as litigating counsel, either in his own court or in another court in the State of Tennessee.

The Tennessee court's interpretation is contrary to the generally held view that a judge may not function as litigating counsel at all, even while winding down a practice, and especially not in his own court. See, e.g., In Matter of Ryman, 394 Mich. 637, 232 N.W.2d

178 (1975). Cady v. Lang, 95 Vt. 287, 115 A. 140 (1921), held that even in the absence of a statute so providing, a judge may not act as an attorney in a case before the court of which he is a member. Without a controlling statute, Prichard v. United States, 181 F.2d 326 (6th Cir. 1950), aff'd, 339 U.S. 974 (1950), held that it was morally if not legally impossible for a judge to enter an attorney client relationship with the person being investigated by a grand jury over which he presided. It was held to be a reversible error in Wood v. Keith, 60 Ark. 425, 30 S.W. 756 (1895) for a judge to appear as counsel in his own court. The court found such a rule necessary to protect the judge from the influences encountered by attorneys which might destroy impartiality of judgment and to protect the court from the undue influence of one who normally presides as judge. It was held grounds for disbarment when an attorney prac-

ticed law in his own court during tenure as county judge, State ex rel. Nebraska State Bar Association v. Wiebusch, 153 Neb. 583, 45 N.W. 2d 583 (1951). Even under the exception allowing a part time judge to practice law, Young v. Grauman, 278 Ky. 197, 128 S.W.2d 549 (1939) held that such judges must be barred from practicing in their own courts.

In a recent case, a Texas court held that a decision of the Texas Optometry Board had to be reversed because two members of the Board acted as investigators and presented all the evidence to the Board. Although the two members did not sit on the panel, the Court held that their advocacy in front of their colleagues engendered an unacceptable and intolerable risk of bias and unfair adjudication. Rogers v. Texas Optometry Board, 609 S.W.2d 248 (Tex. Civ. App. 1980).

Petitioners respectfully urge this court to rule that a judge's appearance as counsel in

his own court denies the opposing party due process of law. A fair and impartial trial is a fundamental requirement of due process. This cannot be assured when there exists the possibility that counsel for one party will unduly influence the judge as a result of his professional or personal relationship with that judge. An unacceptable risk of such influence exists when the judge of a court appears as counsel before another judge in that court. Indeed, in any court in the state, a Chancellor is likely to receive a certain deference not accorded to the opposing counsel. In his own court, where he is accustomed to sharing at least equal authority with the judge hearing the case, this effect is strengthened. Even if only on a subconscious level, this relationship inevitably affects the judge's impartiality. More importantly, the litigant is entitled to be free of any doubts as to the judge's impartiality. As

this Court stated in In Re Murchison, 349 U.S. 133, at 136 (1955):

> A fair trial and a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

This Court has long shown such awareness of the necessity of an impartial judge to secure due process. In Tumey v. Ohio, 273 U.S. 510 (1927), this Court held that it was a violation of due process for the magistrate to have a direct personal interest in the conviction of the defendant, for whatever the evidence against him, the accused had the right to have an impartial judge. More recently, in Gibson v. Berryhill, 411 U.S. 564 (1973), this Court found a violation of due process when a board of licensed optometrists stood to benefit from the revocation of the licenses of a group of optometrists within their state.

We note that the client of a newly appointed judge will suffer from loss of his counsel, if this Court adopts the position that we urge, but this loss is outweighed by significant and unacceptable risks of bias and of unfair adjudication inherent in the judge's participation, as litigating counsel, in his own court.

CONCLUSION

In view of the considerations set forth above, amici respectfully request that the petitioner's petition for a writ of certiorari be granted.

Respectfully submitted,

SUSAN L. KAY

L. HAROLD LEVINSON
Vanderbilt School of Law
Nashville, Tennessee 37240
Attorneys for Amici Curiae*

*This brief was prepared with the assistance of Vanderbilt law students Nancy Brock and Jay Silver.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed, U.S. postage prepaid, to Charles Johnson, 148 Court Avenue, Sevierville, Tennessee 37866, attorney for Respondents, Margaret B. Waters, P.O. Box 2173 Nogales, Arizona 85621, and Honorable William Leech, Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, on this the 30 day of May, 1981.